Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1995

LOUIS PETERS
Petitioner,

-vs-

STATE OF MICHIGAN
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

WHETHER THE MICHIGAN SUPREME COURT'S RULING DISMISSING AN APPEAL BUT ALLOWING A CONVICTION AND A RESTITUTION ORDER TO STAND WHERE THE PETITIONER DIED WHEN THE CASE WAS PENDING DIRECT APPEAL VIOLATED PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW AND HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE PETITIONER BEFORE HIS DEATH CHALLENGED THE AMOUNT IN THE RESTITUTION ORDER AND CHALLENGED THE CONSTITUTIONALITY OF THE NO CONTEST PLEA, THE BASIS OF THAT RESTITUTION ORDER?

a. Does an the order of restitution remain viable where it was the product of an involuntary plea and ineffective assistance of counsel where the issues were raised on direct appeal but petitioner died before review was had?

b. Does a victim's state constitutional right to restitution take precedence over a defendant's right to due process of law and the effective assistance of counsel?

PARTIES TO PROCEEDINGS IN THE CASE BELOW

Parties to the Application for Leave to Appeal in Michigan's Supreme Court were:

Louis Peters, Defendant-Appellee (Petitioner)

Wayne County Prosecutor's Office
John O'Hair, Prosecutor, Plaintiff-Appellant (Respondent)

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REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS IN THE CASE

The first opinion from the Michigan Court of Appeals dismissing the appeal was docket number #136343. This occurred in July 16, 1991. The order of the Michigan Supreme Court denying the prosecution's leave to appeal in this matter is reported at 439 Mich 893 (1991) (case #92369). It occurred on November 26, 1991.

After remand, the opinion of the Michigan Court of Appeal in this case is reported in *People v Peters*, 205 Mich App 312, 517 NW2d 773 (1994). The opinion of the Michigan Supreme Court denying leave to cross-appeal in this matter occurred on January 4, 1995. The opinion of the Michigan Supreme Court in this matter is reported in *People v Peters*, 449 Mich 515, NW2d (1995).

JURISDICTIONAL STATEMENT

Petitions for a writ of certiorari is sought from the August 10, 1995 opinion of the Michigan Supreme Court reversing the decision of the Michigan Court of Appeals in this matter. *People v Peters,* 449 Mich 515, NW2d (1995).

Petition for a writ of certiorari is sought pursuant to 28 USC sec. 1257, which permits review of a final judgment of a state court.

Petition for a writ of certiorari is also sought pursuant to United States Supreme Court Rule 10.1(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the

militia, when in actual time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any ceruminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of la; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

1963 Michigan Constitution, Article 1, section 20

In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than 1 year; to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, to have the assistance of counsel for his defense; to have an appeal as a matter of right; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

1963 Michigan Constitution, Article 1, section 24

Crime victims, as defined by law, shall have the following rights as provided by law:

* * *

The right to restitution.

STATEMENT OF THE CASE

On September 20, 1990, Mr. Peters, an elderly man suffering from lung cancer, entered no contest pleas to four counts of a burning dwelling house, MCL 750.72; two counts of burning real property, MCL 750.73; four counts of burning insured property, MCL 750.75 and one count of conspiracy to burn insured property, MCL 750.157a. The no contest pleas concerned eight specific properties.

During the plea, the court referred to an *in camera* conversation he had with the prosecution and the defense concerning sentence.

> And that's been discussed by myself with counsel off the record. That the demand may be anywhere from one hundred fifty round figures to two hundred thousand dollars in this case. You understand? . . . And so I will be looking to, very, very quick satisfaction of that. (PT-10)[1].

On November 16, 1990, the day of the sentence, the prosecution asked the judge to impose a fine of $10,000.00 and order restitution in the amount of $179,106.24. The prosecution called that figure "the amount of money that we were able to calculate as identifiable costs" incurred by the fire department and "by the insurance companies in responding to these claims." (ST-7).

The court also heard from a representative of Michigan Basic Property Insurance Association (MBPIA). He alleged 25 other homes associated with Mr. Peters had been listed as arson. On those 25 homes, MBPIA paid out $277,000.

Defense counsel objected to including that amount in the order of restitution because at the time the plea was negotiated and discussed with Mr. Peters "Michigan Basic was not a factor that he considered at all." (ST-16). Counsel then asked for time

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[1] PT stands for Plea Transcript. ST stands for Sentencing Transcript. Apx stands for Appendix. S of C stands for Statement of the Case.

to investigate the amount alleged by MBPIA and to see if Mr. Peters had the ability to pay the new proposed amount.

At this point, defense counsel was approached by a family member. Alert to this action taking place off center stage, the court asked "Somebody want to make me an offer?" (ST-20). Some properties of Mr. Peters were offered to the court. The court asked if they were "Those nice Detroit assets — not the Oakland County ones?" (ST 21).[2]

The sentencing judge also stated that even though the defendant had lung cancer, the court was still considering sending him to prison. But if he could obtain some real financial pain he might not.

> That said, if there were sufficient — and I don't like — pain, real pain, and part of that, I think would be, in this case, financial pain, that's part of — of a consideration, and what I would ask you gentlemen to do, . . . identify assets to me that I can tie up, literally, so that I don't have to worry, and I mean bank accounts. I mean real assets.
>
> I don't want garbage, and as long as I'm satisfied that I know where those are and I can tie them up, I'm willing to talk, but I want pain, financial pain out of this. At least maybe that will balance this equation out a little bit. (ST-22).

After a short discussion between defense counsel and the prosecution, the prosecution stated the following:

> It is my understanding that, for purposes of restitution in this matter, the following guidelines will . . . pertain, that is, that $400,000.00 will be repaid or made to this Court, payment made to this court within 12 months from the date of sentencing . . . $100,000.00 increments to be paid every 90 days from the date of sentencing. (ST-24).

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[2] The Court's assumption that the Oakland County properties were worth more than the Detroit properties was unfounded.

The defendant acknowledged that he understood the agreement and the court then sentenced the defendant to three years probation, the first year of which included confinement to his home except for Church and medical treatment for his lung cancer. Restitution was set in the amount of $400,000.00, pending the results of a deposition concerning ability to pay.

An appeal of right was timely filed. That appeal identified the following issues to be considered on appeal.

> The trial court violated the rule in *People v Killebrew* when it entered into a sentence bargain in order to induce the pleas.
>
> The pleas induced by an unfulfilled promise are involuntary.
>
> The failure to inform the defendant of the consequences of his no contest pleas violated the court rule and rendered the pleas involuntary.
>
> Appellant was denied the effective assistance of counsel when his attorney misinformed him about the consequences of his no contest pleas.[3]

At the deposition, no liquid assets with which to make the first payment or any other payment were discovered. Mr. Peters attempted to sell some of his properties but the real estate market was stagnant.

Ignoring the results of the deposition, the trial court officially entered the Order of Restitution on February 15, 1991. The first payment was due the next day. No payment was made. On February 17, 1991, the Appellant asked the Court of Appeals for

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[3] In the Michigan Court of Appeals and Michigan Supreme Court, Petitioner asserted violations of both the Fifth and Sixth Amendments to the United States Constitution. These issues were never decided because of the dismissal of the appeal *ab initio*. In the second trip through the appellate court, the issues, again federalized, were not considered because the court found that the order of restitution must also be dismissed. 205 Mich App 312, 321 (1994). These issues, again federalized, were preserved by filing a cross appeal in the Michigan Supreme Court. Leave to cross appeal was denied.

a stay of the order of restitution. This motion was denied on May 1, 1991.

On March 15, 1991, Louis Peters was arrested on a warrant for probation violation. He was jailed on a high bond. His family, fearing for his health, bonded him out of jail. A probation violation hearing was held on April 18 and 19, but Mr. Peters was in the hospital. He died of lung cancer on April 22, 1991.

On July 16, 1991, the Court of Appeals issued an order remanding the case to the lower court for entry of an order dismissing the case *ab initio* because of his death.

On February 4, 1992, the lower court entered an order dismissing the case *ab initio*, but holding that the Order of Restitution survived because the Michigan Constitution, Art I, Section 24 gave crime victims the right to restitution. The defense appealed this ruling.

On May 16, 1994, the Court of Appeals issued an opinion reversing the lower court's ruling, but also ruling that the Insurance Company could recover from the estate in civil proceedings.[4] 205 Mich App 312, 517 NW2d 773 (1995).

The prosecution filed an application asking for leave to appeal. This was granted. The defense filed an application to cross-appeal on those issues surrounding the voluntariness of the plea, the effective assistance of counsel, and the amount in the restitution order. Leave to cross-appeal was denied. 448 Mich 851 (1995). On August 10, 1995, the Michigan Supreme Court reversed the Michigan Court of Appeals. 449 Mich 515, NW2d (1995). The Court not only allowed the restitution order to stand but it also reinstated the conviction.

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[4] The prosecution along with one of the complainant insurance companies, Michigan Basic, sued the state of Louis Peters in Oakland County Probate Court. *In re Estate of Louis J. Peters*, 91-2118101E.

REASONS FOR GRANTING THE WRIT

Any discussion on whether a conviction survives the death of an appellant must begin with *Durham v United States*, 401 US 481; 28 L Ed 2d 200 (1971). In that case, this Court held that the death of a defendant during the pendency of his appeal from a criminal conviction abates the action *ab initio*. The *Durham* decision rested on the decision in *Crooker v United States*, 325 F2d 318 (CA 8, 1963), where the Eighth Circuit reviewed all earlier federal cases and found that they unanimously held that abatement of all proceedings was the proper remedy.

Four years after the *Durham* decision, Michigan followed the rule in *People v Elauim*, 393 Mich 601, 227 NW2d 553 (1975). Mr. Elauim appealed his first degree murder conviction to the Court of Appeals where it was affirmed. After filing an application for leave in the Michigan Supreme Court, he died. In a per curiam decision citing *Durham v United States.*, the Court vacated the judgments of the lower courts and remanded the case for dismissal of the indictment.

Appeals of Right vs Collateral Attacks

On the first appeal in the instant case, the Prosecution argued that *Durham, supra* lost precedential value after the United States Supreme Court decided *Dove v United States*, 423 US 325, 46 L Ed 2d 531 (1976). The *Dove* opinion reads as follows:

> The Court is advised that the petitioner died at Bern, N.C., on November 14, 1975. The petition for certiorari is therefore dismissed. To the extent that *Durham v States*, . . ., may be inconsistent with this ruling, *Durham* is overruled.

Petitioner contends that the *Dove* decision applies only to petitions for writs of certiorari as opposed to appeals of right. Thus, *Durham v United States*, 401 US 481, 28 L Ed 2d 200 (1971), is still the law controlling cases on direct review. See also *United States v Oberlin*, 718 F 2d 894, 895 (9th Cir, 1983). Except for the Fourth Circuit, the other circuits have agreed with

that interpretation. *United States v Pauline*, 625 F2d 684 (5th Cir, 1980); *United States v Wilcox*, 783 F2d 44 (6th Cir, 1986); *United States v Moehlenkamp*, 557 F 2d 126 (7th Cir. 1977); *United States v Littlefield*, 594 F2d 682 (8th Cir. 1979); *United States v Bechtel*, 547 F2d 1379 (9th Cir. 1977).

The Fifth Circuit noted in *United States v Moehlenkamp, supra*, 557 F2d at 128 that the appellate process is an integral part of the process which adjudicates guilt and innocence.

> The Supreme Court may dismiss the petition without prejudicing the rights of a deceased petitioner, for he has already had the benefit of the appellate review of his conviction to which he was entitled of right. In contrast, when an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal which is an 'integral part of [our] system for finally adjudicating [his] guilt or innocence.' *Griffin v Illinois*, 351 US 12, 18 ... (1956)

When faced with a mootness issue, the D.C. Circuit in *Clark v United States*, 915 F2d 714 (DC Cir, 1990), referred to the Durham decision for an analogy.

> It is well established that the death of a criminal defendant abates the prosecution, and requires his conviction to be vacated if the defendant dies while his case is *pending* review by the court of appeals. See, e.g. *United States v Oberlin*, 718 F2d 894, 895 (9th Cir. 1983). If, however, the defendant dies *after* the court of appeals affirms his conviction, the Supreme Court merely dismisses any outstanding petition for certiorari *without* vacating the conviction. See *Dove v United States*, ... overruling *Durham v United States* ... (emphasis in the original).

The Second Circuit in *United States v Mollica*, 849 F2d 723 (2nd Cir, 1988) also dismissed an indictment where the defendant died while the case was on direct appeal. It limited its

holding to the facts of the case before it which might imply that were it not a direct appeal the result might have been different.

Thus, at least the Second, Fifth, Sixth Seventh, Eighth, Ninth and the D.C. Circuits agree that the *Dove* case did not overrule *Durham*.

Several states also follow the general rule that death abates a case on direct appeal, but not on a discretionary appeal. *Jones v State*, 302 Md 153, 486 A2d 184 (1985). A list of those states can be found in *Abatement-Death Pending-Appeal*, 80 ALR 4th 189. But Illinois extends the rule to a discretionary appeal where leave was already granted finding the situation analogous to a direct appeal. *People v Mazzone*, 383 NE2d 947 (1978).

Other jurisdictions reject the doctrine of abatement altogether allowing the appeal to continue. *State v McDonald*, 144 Wis 531, 424 NW2d 411 (1988).

In the instant case, the death occurred during the pendency of the direct appeal and so the Michigan Court of Appeals held that the case must be dismissed *ab initio*. But the Michigan Supreme Court held that there would be no dismissal of the criminal conviction and no dismissal of the order of restitution.

Fines, Costs, and Restitution

Although the instant case was dismissed *ab initio*, the trial court allowed the restitution order to stand. Thus the next question to be answered is whether the restitution order survives the dismissal.

In *United States v Crooker, supra*, the Eighth Circuit held that an abatement of a criminal case included any fine imposed on the defendant. The court explained that the fine was a penalty placed on the defendant personally, not on his family.

> If, while he lived, it had been collected, he would have been punished by the deprivation of that amount from his estate; but upon his death, there is no justice in punishing his family

for his offense. at p. 321. quoting from *United States v Pomeroy*, 152 F 279.

The first case to deal with an order of restitution, as opposed to a fine, was *United States v Dudley*, 739 F2d 175 (4th Cir, 1984). The *Dudley* court held that restitution is imposed to make the victim whole, not to punish the defendant. As such, the order of restitution is not abated by death because only penal consequences are abated by death.

In the case of a fine, the Fifth Circuit found that the rule that death abates the entire proceeding where appellant dies during the direct appeal so firmly established that it ordered the return of a $100,000 bond, placed with the clerk of the court as security for a fine, with all accrued interest to the legal representative of the deceased appellant. *United States v Schuster*, 778 F2d 1132 (5th Cir, 1985).

But eight years later, the Fifth Circuit was less sure of the rule. In *United States v Asset*, 990 F2d 208 (5th Cir, 1993), the Court drew a distinction between purely penal aspects of a criminal proceedings and aspects which attempt to make the victim whole. In *Asset*, the defendant died after the plea but before the sentence was ever imposed. However, before dying, the appropriately-named defendant made restitution to the victim, the Railroad Retirement Board, in the amount of $50,000. The Fifth Circuit held that the payment was designed primarily to make the Railroad Board whole and would not be returned to the estate of the deceased.

> Where restitution is intended to compensate the victim, rather than being imposed solely to penalize the defendant, the defendant's death does not affect that purpose; the justification for such restitution survives the defendant's death. And in e court's view, requiring restitution would not undermine the purpose of abatement since the goal of the payment is not to punish the defendant but to restore the victim's losses 990 F2d at p 214.

In *United States v Cloud*, 921 F2d 225 (9th Cir, 1990), the appellant challenged the portion of his sentence which said that in the case of his death, the unpaid balance of his restitution payments became due. He argued that the restitution order violated 18 USC 3565(h). This statute now repealed stated that the obligation to pay a fine or penalty ceases upon death. In affirming the restitution order, the court held that the statute did not apply to orders issued under the Victims and Witnesses Protection Act, 18 USC 3663.

But the Ninth Circuit also noted that while a significant objective of Congress in passing the Victim Witness Protection Act was to restore the victim to his or her prior state of well-being, they were also cognizant of the primacy of a defendant's constitutional rights.

> . . . one of Congress' purposes in enacting the legislation was 'to ensure that the federal government does all that is possible within limits of the available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant.' Pub.L. No. 97-291, sec. 2, 96 Stat. 1248 (18 USC sec. 1512 note). quoted at 921 F2d page 227.

The *Dudley* case and its progeny are easily distinguishable from the instant case in three very important ways. First, there was no challenge to the amount of restitution in *Dudley*. The Dudley court actually breathed a sigh of relief because it was not faced with a challenge to the order of restitution.

> Here we are spared the risks of multiplication of novelty since, as far as matters appear to us, there has generally been no effort at trial . . . to contest the accuracy of the amount of the restitution ordered ($4,807.50) nor does the question appear to have been preserved as to other factual defenses to an order of restitution. fn 8 *Dudley v United States supra.* p. 179

Footnote 8 reads as follows:

> E.g no question appears to have been raised as to the correctness of the amount or as to whether under ... the financial resources of Dudley or his dependents may make restitution partly or wholly inappropriate.

Second, as indicated above, Mr. Dudley was convicted after a jury found him guilty and the amount of money owed had been litigated at the trial.

Third, the sentencing judge in the instant case used the order of restitution to punish Mr. Peters. He specifically stated that he, the Judge, wanted real pain, financial pain. He was not interested in making the victim whole. (S of F-2).

What the Fourth Circuit was spared in 1984, this Court now faces. The order of restitution in the instant case is vulnerable on several grounds. First, while a no contest plea usually is the functional equivalent of a guilty plea, the validity of the plea in the instant case was extracted from a lung cancer patient faced with the rigors of being in trial. Second, the order and plea were challenged on the appeal as of right, and in every proceeding thereafter, as being illegally coerced by the trial judge in violation of a state rule which prohibits a trial judge from participating in plea negotiations. *People v Killebrew,* 416 Mich 189, 330 NW2d 834 (1982). Third, the plea was also being challenged under the Fifth and Sixth Amendments as not having been made voluntarily and understandingly because of 1) ineffective assistance of counsel in the failure of counsel to advise Mr. Peters that he may be held liable monetarily for the complete course of conduct; 2) the lower court's failure to advise the defendant of the penal consequence of the plea — that is that he could be held liable for the complete course of conduct.

Finally, the sentencing judge did not order restitution of $400.000.00 to make the insurance company whole. The order was designed to be a penalty on Mr. Peters. (S of F-2). For instance, there was no inquiry into how much money the insurance company had received in premiums and the interest that

accrued on those premiums over the years. That sum would have to be deducted from the overall loss figure.

Consequently, this Court should find that a dismissal *ab initio* of a case on direct appeal includes an order of restitution where the amount contained in the Order was under challenge, where the very procedure used to obtain the order was also under constitutional attack on appeal, and where as here the order was penal in nature rather than compensatory.

Challenges To Restitution Orders

As indicated earlier, the direct appeal is an integral part of the process of determining guilt or innocence. In *United States v Pogue*, 19 F 3d 663 (DC Cir, 1994), the Court harkened back to the principle underlying the abatement rule which is that 'the interests of justice ordinarily require that [a defendant not stand convicted without resolution of the merits' of an appeal. In *Pogue*, the government asked the court to allow the restitution order to survive the dismissal of the case *ab initio*. Unfortunately, the *Pogue* case will offer this Court little guidance on this issue because the government in *Pogue* conceded that the estate was penniless and thus the Court found the issue to be moot. But the Court was also unpersuaded by the Government's argument that there should be an exception to the abatement rule where the defendant plead guilty. The Court noted that a guilty plea did not waive the right to appeal.

The *Pogue* case is important for its discussion of the effect of the pending appeal in response to the Government's argument that the restitution order should stand because **perhaps** the deceased would have dropped the appeal and **maybe** he was not going to challenge the sentence.

> What is important is that appellant had filed a timely appeal before his death; the appeal was not withdrawn; and had he lived appellant could have challenged the plea agreement and underlying conviction, his sentence and/or the terms of restitution. ... The abatement rule applies when a direct

appeal is pending at the time of the appellant's death. This was precisely the situation in this case. We do not know what the appellant may have done had he lived, and we have no authority to speculate on this matter. 665-666.

In the instant case, Mr. Peters' constitutional challenges to the plea and his challenge to the amount in the restitution order were never reviewed by any appellate court.

While the prosecution may argue that a nolo contendere plea has the same effect as a guilty plea, this particular plea was less reliable because Mr. Peters medical situation was too precarious to permit him the rigors of a trial. (S of C 3, 4). This is exactly the kind of situation where the interests of justice require that the defendant not stand convicted without resolution of the merits of the appeal. The right to appeal in the instant case was of overwhelming importance to the Defendant. See *Griffin v Illinois, supra.*

Finally, the restitution order does not specify to whom the money goes or which properties are covered. Does the $400,000 figure include properties which burned before Art I, sec. 24, 1963 Constitution, the victim's rights clause, went into effect?

Constitutional Challenges to the Conviction and Restitution Order

a. An order of restitution does not remain viable where it was the product of an involuntary plea and ineffective assistance of counsel where the issues were raised on direct appeal but petitioner died before review was had.

Any waiver of the constitutional right to a trial must be voluntary. *Brady v United States,* 397 US 742; 25 L Ed 2d 747 (1970). The court in *People v Killebrew, supra,* p. 202 (1982), recognized that a judge's participation in plea and sentence

bargains might vitiate the voluntariness of a waiver of the right to a jury trial.

> The problem of coercion arises from the disparate bargaining positions of the judge and the defendant: the judge wields the decisive sentencing power to which the defendant must submit. Should the trial judge exert or even seem to exert the authority of this position to induce the defendant to plead guilty, the voluntariness of the defendant's subsequent waiver of his right to a jury trial becomes questionable.

Thus, the court held that any involvement by the judge in the negotiations transforms a discussion into a potentially coercive situation.

The court also expressed concern that the public was harmed when a judge engaged in plea and sentence negotiations.

> Nor is it only the defendant who is harmed by allowing the judge to become involved in the negotiation of the plea bargain. The public perception of the judge as a neutral arbiter, must suffer when the judge descends from the bench to barter with the defendant and the prosecutor over the terms of the deal he advocates. *People v Killebrew, supra,* p. 204.

The court approved a procedure in which the defense and the prosecution recommend a sentence to the judge as part of a plea bargain. If on the day of sentence, the judge cannot follow the recommendation, the defendant must be informed and given an opportunity to withdraw the plea. MCR 6.302(C)(3).

In the instant case, the court told the defendant at the plea hearing that after discussions with both counsel, restitution would be between $150,000.00 and $200,000.00. (S of C-1). His participation was further evidenced by his attempt on the day of sentence to get the defendant to offer Oakland county property, rather than Detroit property to make restitution. (S of C-2). Thus the court violated the holding in *Killebrew,* drawing into question the voluntariness of the plea.

The court also violated MCR 6.302(C)(3) when it failed to offer the defendant the opportunity to withdraw the plea after it had decided to raise the amount of restitution from the $200,000.00 limit to $400,000. Again, the voluntariness of the plea is drawn into question.

Moreover, where the Order of Restitution is produced in violation of the rule in *Killebrew,* it is obtained by violating the Defendant's due process rights. On the appeal as of right, the appellee challenged the plea on this basis. But because of the appellee's death, the Court of Appeals ordered the criminal case dismissed *ab initio.* Thus, the constitutionality of the plea was never decided.

Since the plea was induced by a promise and that promise concerned the amount of money in the Order of Restitution, how can the Order of Restitution survive a dismissal? If it does survive, then the issue of the constitutionality of the plea must be litigated. However, there can be no full and fair hearing in the absence of Mr. Peters.

Moreover, a trial judge must also inform the defendant of the consequences of his decision to plead guilty. While the trial judge does not have to inform the defendant of all possible consequences, he must inform the defendant of "the direct consequences including the actual value of any commitments made to him." Where a defendant surrenders his right to trial in apparent misapprehension of the value of the commitment, the plea must be set aside. *People v Lawson*, 75 Mich App 726 (1977); *Hammond v United States*, 528 F 2d 15, 19 (CA 4, 1975); MCR 6.302(B) and (C).

In the instant case, the court failed to tell the defendant that he would be responsible for restitution for an alleged course of conduct stretching back to 1982. The difference between the amount the appellant was apprised of during the plea hearing and the amount actually imposed on him was minimally $200,000.00.

What Michigan's court rule and FRCrP 11 attempt to avoid are situations where the defendant is coerced into a plea because

the consequences are made to appear minimal. The rule is not limited to advice concerning the possible length of a prison term. It includes monetary terms where the court has stated that they will be part of its sentence. Once it undertakes to advise a defendant of consequences, the advice must be as accurate as possible. The failure to advise petitioner of the maximum possible monetary consequence of the plea renders the plea involuntary.

Where death and the judiciary have denied petitioner his right to appellate review, the conviction must be abated *ab initio* and the order of restitution must also be dismissed.

Victim's vs Defendant's Constitutional Rights

b. A victim's state constitutional right to restitution does not take precedence over a defendant's right to due process of law and the effective assistance of counsel.

Lastly, trial counsel failed to advise Mr. Peters that he could be liable for the whole course of conduct. Counsel has a duty to inform a guilty-pleading defendant of the consequences of the plea. Where the failure amounts to grossly erroneous advice, a finding of a denial of the effective assistance of counsel is proper. *Sparks v Sowders*, 852 F2d 882 (6th Cir, 1988).

The lower court held that the Order of Restitution should survive the dismissal *ab initio* because of the victim's rights. It cited the 1963 Constitution, Art. 1, section 24. That section identifies nine rights of the crime victim, one of which is the right to restitution.

In balancing competing constitutional rights, the defendant's rights have been held to prevail, even over a right as important as that of freedom of the press. *Shephard v Maxwell*, 384 US 333, 16 L Ed2d 600 (1956). Likewise, cases which have contemplated allowing the restitution order to survive abatement of the case have indicated that the defendant's right to appeal and to appeal the order itself must also survive abatement. *United States v Cloud, supra; United States v Pogue, supra.*

Consequently, a victim's right even under a state constitution should not take precedence over the federal constitutional right of the defendant to due process of law in a criminal proceeding. Am V, US Const. Nor should that right take precedence over the petitioner's right to the effective assistance of counsel which was denied here when the attorney failed to advise Mr. Peters that he could be held responsible for the entire course of conduct. Am VI, US Const. Nor should a victim's right under a section of a state constitution take precedence over a criminal defendant's right under a state constitution to appeal his conviction.

CONCLUSION

For all of these reasons, the petition should be granted.

Respectfully submitted,

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PEOPLE v PETERS

Docket No. 99830. Argued May 3, 1995 (Calendar No. 16). Decided August 10, 1995.

Louis Peters pleaded nolo contendere in the Detroit Recorder's Court, Michael Talbot, J., to four counts of burning dwelling houses, two counts of burning real property, four counts of burning insured property, and one count of conspiracy to burn insured property. The defendant was sentenced to three years' probation and to pay a fine and restitution. The defendant appealed the restitution order, but died during the pendency of his appeal. Thereafter, the Court of Appeals, BRENNAN, P.J., and GILLIS and GRIBBS, JJ., in an unpublished order, remanded the case for dismissal ab initio (Docket No. 136343). The Court of Appeals denied the prosecutor's motion for rehearing, and the Supreme Court denied leave to appeal, 439 Mich 893 (1991). On remand, the court, Richard L. Cunningham, J., abated the criminal conviction and fine, but held that the order of restitution survived the abatement of the criminal case. After remand, the Court of Appeals, MICHAEL J. KELLY, P.J., and SHEPHERD and MURPHY, JJ., reversed, holding that an order of restitution must be vacated when a defendant's criminal conviction is abated ab initio because of the defendant's death (Docket No. 149161). The people appeal.

In an opinion by Justice WEAVER, joined by Chief Justice BRICKLEY, and Justices BOYLE, RILEY, and MALLETT, the Supreme Court *held:*

Where a convicted defendant dies pending appeal, the appeal should be dismissed, absent collateral consequences, and the underlying conviction and accompanying compensatory sentencing sanctions should stand. Purely penal sanctions should be abated ab initio because they no longer continue to serve a purpose.

1. In Michigan, a criminal conviction destroys the presumption of innocence regardless of an appeal of right. No state interest under the facts of this case can be served by allowing an appeal to proceed when the defendant is not available for trial. It is better to allow the litigation to end and the presumptively valid conviction to stand.

2. Typically, two purposes are identified for sanctions associ-

ated with a criminal conviction: penal and compensatory. The majority of jurisdictions abate or dismiss sanctions that are primarily penal. However, consistent with the Crime Victim's Rights Act, MCL 780.751 *et seq.*; MSA 28.1287(751) *et seq.*, and Const 1963, art 1, § 24, where the intent is to compensate the victim, a fine or order may survive the death of the offender.

3. In this case, although the order of restitution would cause financial pain, financial pain does not automatically render the order primarily penal. The logic that supports dismissal of the appeal also supports enforcing the order of restitution.

Reversed and remanded.

Justice CAVANAGH, joined by Justice LEVIN, dissenting, stated that because the defendant died during the pendency of his appeal of right, the entire criminal cause, including the restitution order stemming from the conviction, should be abated.

The rule of abatement ab initio should be applied to abate the entire criminal cause, i.e., the appeal and the conviction, in cases in which the defendant dies pending resolution of an appeal of right. In cases in which the defendant dies pending a discretionary appeal, the appeal should be dismissed as moot, and the conviction and its collateral consequences should stand. The interest of justice requires deference to a criminal defendant's constitutional right to an appeal when the defendant dies during the pendency of an appeal of right. When the issues are compensation stemming from a conviction versus a final adjudication of a defendant's guilt or innocence, notions of fundamental fairness demand giving priority to the latter.

205 Mich App 312; 517 NW2d 773 (1994) reversed.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief, Research, Training, and Appeals, and *Janet A. Napp,* Assistant Prosecuting Attorney, for the people.

Elizabeth L. Jacobs for the defendant.

WEAVER, J. We granted leave to consider whether an order of restitution should abate where a convicted criminal defendant died pending

appeal of his conviction.[1] To decide this issue it is necessary to clarify our position on the rule of abatement ab initio.

In *People v Elauim*, we applied the rule of abatement ab initio to dismiss an appeal from a criminal conviction and erase the criminal conviction and accompanying penal sanctions where a defendant died pending appeal.[2] We continue to believe that it is appropriate to dismiss an appeal upon the death of a convicted criminal defendant, but are not persuaded that abatement ab initio, when applied to compensatory sanctions, is consistent with Michigan law since the 1985 enactment of the Michigan Crime Victim's Rights Act, MCL 780.751 *et seq.*; MSA 28.1287(751) *et seq.*, and the 1988 amendment of art 1, § 24 of the Michigan Constitution. Instead, we hold that where a convicted defendant dies pending appeal, the appeal should be dismissed, absent collateral consequences not presented here, and the underlying conviction and accompanying compensatory sentencing sanctions should stand. Purely penal sanctions, however, should be abated ab initio because they no longer continue to serve a purpose.

I

On September 20, 1990, defendant Louis Peters entered a plea of no contest to four counts of burning dwelling houses, MCL 750.72; MSA 28.267; two counts of burning real property, MCL 750.73; MSA 28.268; four counts of burning insured property, MCL 750.75; MSA 28.270; and one count of conspiracy to burn insured property, MCL 750.157a; MSA 28.354(1) and MCL 750.75; MSA 28.270. At sentencing, defendant was ordered to

[1] 448 Mich 851 (1995).

[2] 393 Mich 601; 227 NW2d 553 (1975).

serve three years' probation, to pay a criminal fine of $10,000, and to pay $400,000 in restitution.[3] The restitution was to be divided between the victims, the City of Detroit ($140,000) and Michigan Basic Property Insurance Association ($260,000).[4] Because defendant was suffering from terminal lung cancer, he was not ordered to serve time in jail.

Defendant appealed the amount of the restitution order.[5] However, during the pendency of his appeal, defendant died. On notification of defendant's death, the Court of Appeals remanded the case for entry of an order dismissing the case ab initio.[6] The Court of Appeals denied the prosecutor's motion for rehearing, and we denied the prosecution's leave to appeal the denial of rehearing at that time.[7] On remand, the trial court abated the criminal conviction and $10,000 fine, but held that the $400,000 order of restitution survived the abatement ab initio of the criminal case. The trial court relied on art 1, § 24 of the Michigan Constitution, which guarantees a crime victim's right to restitution, and the reasoning of *People v Dudley*, 739 F2d 175 (CA 4, 1984).[8]

Defendant, by his attorney, appealed the trial

[3] Defendant was also ordered confined to his home for the first year of probation, to pay for the associated costs of that confinement, and not to practice real estate during his probation.

[4] The City of Detroit estimated that it had expended approximately $179,106.24 fighting the fires that were the subject of defendant's convictions. Michigan Basic testified that of ninety homes owned by defendant that had burned, twenty-five were listed as resulting from arson. Michigan Basic had paid $277,000 in proceeds for those twenty-five homes.

[5] Defendant also alleged that the plea was improperly induced and involuntary, that defendant was not informed of the consequences of his plea, and that he was denied effective assistance of counsel.

[6] Unpublished order, entered July 16, 1991 (Docket No. 136343).

[7] 439 Mich 893 (1991). Justices BRICKLEY, BOYLE, and RILEY would have granted leave.

[8] The United States Court of Appeals for the Fourth Circuit held that the death of a defendant pending appeal required that the purely penal sanctions abate, but an order of restitution survived.

court's ruling regarding the order of restitution. The Court of Appeals reversed, holding that an order of restitution must be vacated when a defendant's criminal conviction is abated ab initio because of defendant's death.[9] The prosecution appealed the abatement of the order of restitution.[10] We reverse and reinstate the order of restitution.

II

There is no federal constitutional right to an appeal.[11] However, the perception of appeal as the opportunity to finally determine a convicted defendant's guilt or innocence is one source of the rule of abatement ab initio. Despite this perception, it is well established in the federal system that, once convicted, a criminal defendant is no longer presumed innocent.[12] Art 1, § 20 of the Michigan Constitution does provide for an appeal of right from a criminal conviction. Even given this appeal of right, a criminal conviction in Michigan also destroys the presumption of innocence.[13] A convicted criminal defendant must prove error requiring reversal.[14] It is also interesting to note that the appeal of right has recently been limited.[15] Although the recent constitutional amendment does

[9] 205 Mich App 312; 517 NW2d 773 (1994).

[10] We denied defendant's cross appeal regarding the voluntariness of his plea by order dated January 4, 1995. 448 Mich 851.

[11] *Ross v Moffit*, 417 US 600, 611; 94 S Ct 2437; 41 L Ed 2d 341 (1974).

[12] *Herrera v Collins*, 506 US —; 113 S Ct 853; 122 L Ed 2d 203 (1993).

[13] *People v Rowell*, 14 Mich App 190; 165 NW2d 423 (1968); *People v Tate*, 134 Mich App 682; 325 NW2d 297 (1984).

[14] *Rowell*, n 13 *supra*.

[15] The appeal of right no longer applies to guilty pleas and pleas of nolo contendere. Const 1963, art 1, § 20 as amended December 24, 1994. On April 1, 1995, this Court amended Michigan Court Rule 7.203 to exclude convictions in criminal cases based on a guilty plea or a plea of nolo contendere from appeals of right.

not apply in this case, we find that the appeal of right was personal to the defendant and, therefore, died with him.[16]

In literal application, abatement ab initio erases a criminal conviction from the beginning on the theory that all injuries resulting from the crime "'are buried with the offender.'"[17] The reasoning behind abatement ab initio varies among jurisdictions ascribing to the rule.[18] Some jurisdictions distinguish between appeals of right and discretionary review when applying the rule. Those jurisdictions that have rejected the rule of abatement ab initio may dismiss the appeal,[19] abate the appeal,[20] allow the appeal to proceed notwithstanding the defendant's death,[21] or substitute a personal representative for the defendant.[22]

This Court's treatment of appeals from criminal convictions on the defendant's death has varied. In *People v Elauim,* 393 Mich 601; 227 NW2d 553 (1975), this Court abated ab initio the indictment of a defendant who died pending his appeal from a conviction for first-degree murder. The *Elauim* Court relied on the reasoning of the United States Supreme Court in *Durham v United States,* 401

[16] Other jurisdictions allow a substitute to pursue the defendant's appeal. See, e.g., *State v Makaila,* 1995 WESTLAW 355150 (Hawaii) (June 14, 1995). However, we see no reason to allow a substitute to pursue the appeal or to upset a presumptively valid conviction.

[17] *United States v Oberlin,* 718 F2d 894, 896 (CA 9, 1983), quoting *United States v Dunne,* 173 F 254, 258 (CA 9, 1908).

[18] See, e.g., *Hartwell v Alaska,* 423 P2d 282 (Alas, 1967) (abatement from the beginning because the presumption of innocence stands until the conclusion of an appeal); *Arizona v Griffin,* 121 Ariz 538; 592 P2d 372 (1979) (conviction abates from the beginning because society's interest in protection has been satisfied and punishment is impossible); *Maine v Carter,* 299 A2d 891 (Me, 1973) (conviction abates because it is moot and for the lack of an indispensable party).

[19] *Whitehouse v Indiana,* 266 Ind 527; 364 NE2d 1015 (1977).

[20] *Vargas v Texas,* 659 SW2d 422 (Tex Crim App, 1983).

[21] *Wisconsin v McDonald,* 144 Wis 2d 531; 424 NW2d 411 (1988).

[22] *Ohio v McGettrick,* 31 Ohio St 3d 138; 509 NE2d 378 (1987).

US 481; 91 S Ct 858; 28 L Ed 2d 200 (1971). In *Durham*, a criminal defendant's indictment was abated following his death.[33] However, in other cases this Court has dismissed appeals from criminal convictions that were interrupted by the death of the defendant, apparently allowing the convictions to remain intact.[34]

We take this opportunity to clarify our position on abatement ab initio. Where a defendant dies pending an appeal of a criminal conviction, we hold that the appeal should be dismissed, but the conviction retained. The conviction of a criminal defendant destroys the presumption of innocence regardless of the existence of an appeal of right. We therefore find that it is inappropriate to abate a criminal conviction.

Further, it is better policy to allow the litigation to end and the presumptively valid conviction to stand than it is to allow the convicted defendant's survivors to pursue litigation ad infinitum, in an effort to clear the deceased defendant's name. We

[33] The United States Supreme Court at least partially overruled *Durham* five years later when it dismissed a defendant's petition for certiorari upon his death in *Dove v United States*, 423 US 325; 96 S Ct 579; 46 L Ed 2d 531 (1976). The majority of federal courts has interpreted *Dove* as overruling *Durham* only to the extent that *Durham* would abate ab initio convictions where the defendant had no appeal of right. We are not bound by these decisions because no federal constitutional right is implicated.

Further, the *Durham* Court appeared to dismiss the distinction between appeals of right and discretionary appeals: "Since death will prevent any review on the merits, whether the situation is an appeal [of right] or certiorari [i.e., a discretionary appeal], the distinction between the two would not seem to be important for present purposes." 401 US 483, n *. See also *United States v Dwyer*, 855 F2d 144, 145-146 (CA 3, 1988) (Sloviter, J., concurring); *State v McDonald*, 138 Wis 2d 366, 370; 405 NW2d 771 (Ct App, 1987) (Sundby, J., concurring) (affirmed in part and reversed in part) 144 Wis 2d 531; 424 NW2d 411 (1988).

[34] *People v Gratopp*, unpublished order of the Supreme Court, entered January 28, 1991 (Docket No. 90262); *People v Weston*, unpublished order of the Supreme Court, entered June 8, 1989 (Docket No. 73131); *People v McCree*, 383 Mich 755 (1969); *People v Lester Smith*, 383 Mich 753 (1969).

agree with the rationale offered by the Indiana Supreme Court:

> The presumption of innocence falls with a guilty verdict. At that point in time, although preserving all of the rights of the defendant to an appellate review, for good and sufficient reasons we presume the judgment to be valid, until the contrary is shown. To wipe out such a judgment, for any reason other than a showing of error, would benefit neither party to the litigation and appears to us likely to produce undesirable results in the area of survivor's rights in more instances that it would avert an injustice.[25]

Finally, we see no state interest, under the facts presented in this case, that can be served by allowing an appeal to proceed when the defendant is not available for trial.[26]

III

Given our decision to dismiss an appeal and retain the conviction where a criminal defendant dies with an appeal pending, we now consider the status of fines, penalties, and orders that may accompany a criminal conviction. The majority of jurisdictions that have addressed this issue have found that the resolution turns on the purpose the fine, penalty, or order is to serve. Typically, jurisdictions have identified two purposes for the sanctions associated with a criminal conviction: penal and compensatory.[27] The majority of jurisdictions abate or dismiss sanctions that are primarily pe-

[25] See, e.g., *Whitehouse v Indiana*, n 19 *supra* at 529-530.

[26] *Haines v State*, 428 So 2d 590 (Miss, 1983).

[27] See, e.g., *United States v Dudley*, *supra*; *United States v Asset*, 990 F2d 208 (CA 5, 1993); *United States v Cloud*, 872 F2d 846 (CA 9, 1989).

nal.[28] However, where the intent behind a fine or order is to compensate the victim, the fine or order may survive the death of the offender.[29] Although the distinction between penal and compensatory is helpful, it is not always clear. Indeed, with almost any sanction, it is possible to identify both penal and compensatory purposes.

In this case, we address whether an order of restitution should abate on the death of defendant. Although defendant argued that the order was a penalty because it would force him to pay a large sum of money, the order was designed to compensate the City of Detroit Fire Department and Michigan Basic for their combined costs of approximately $456,000. Pursuant to stipulation by the parties, a substantial portion of those costs were to be recouped by the victims through restitution. However, the fact that defendant, now his estate, will experience some "financial pain" does not transform the restitution order into a primarily penal sanction. Erasing the order of restitution or even attempting to divine the portion of the order that the trial judge acknowledged he hoped would cause some "financial pain" is inconsistent with the Michigan Constitution and the Michigan Crime Victim's Rights Act. These laws authorized the payment of restitution, because the victims had suffered significant losses as a result of defendant's criminal conduct.

The Michigan Crime Victim's Rights Act was enacted in 1985 in response to growing recognition of the concerns of crime victims. The act codifies a crime victim's right to restitution, while leaving to the discretion of the sentencing judge the form the restitution will take:

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[28] *Id.*

[29] *United States v Dudley, supra.*

> [T]he court, when sentencing a defendant convicted of a crime, shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full or partial restitution to any victim of the defendant's course of conduct that gives rise to the conviction, or to the victim's estate.[30]

In 1988, after the enactment of the Crime Victim's Rights Act, Michigan's Constitution was amended to further enumerate the rights of crime victims.[31] These laws underscore the rights of crime victims and the compensatory nature of restitution in Michigan.

At sentencing in this case, the Wayne County Prosecutor's office, on behalf of the Detroit Fire Department, and Michigan Basic, on its own behalf, presented evidence of defendant's financial victimization of them. The prosecutor requested $179,106.24 to cover the costs incurred by the Detroit Fire Department in extinguishing the fires that were the subject of the defendant's no contest

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[30] MCL 780.766(2); MSA 28.1287(766)(2).

[31] Art 1, § 24(1) states:

> Crime victims, as defined by law, shall have the following rights, as provided by law:
>
> The right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.
>
> The right to timely disposition of the case following arrest of the accused.
>
> The right to be reasonably protected from the accused throughout the criminal justice process.
>
> The right to notification of court proceedings.
>
> The right to attend trial and all other court proceedings the accused has the right to attend.
>
> The right to confer with the prosecution.
>
> The right to make a statement to the court at sentencing.
>
> The right to restitution.
>
> The right to information about the conviction, sentence, imprisonment, and release of the accused.

plea. Michigan Basic reviewed a decade of records involving claims in which defendant was a named insured and discovered that it had paid defendant approximately $800,000 as a result of ninety fires. In twenty-five of those fires, involving payments of approximately $277,000, arson was suspected.[33] After some discussion off the record, the parties orally stipulated to and the trial court adopted a $400,000 restitution figure.[33]

On the basis of some language employed by the trial judge,[34] counsel for defendant argued on appeal that the restitution order was primarily penal. The Court of Appeals apparently agreed. We find that the Court of Appeals and defense coun-

[33] It showed restraint on the part of the trial judge to limit consideration of Michigan Basic's injuries to the twenty-five suspicious fires, given defendant's course of conduct.

[33] The parties' agreement included Michigan Basic's promise not to pursue federal RICO charges against defendant.

[34] As the parties prepared to negotiate a stipulated amount of restitution, the trial judge stated:

> Here's what I want . . . . I'm not telling you that I've already drawn a bottom line in terms of sentence, but we know as an absolute fact that Mr. Peters has cancer. He's 67 years old, and he has lung cancer, and, quite frankly, the doctor says that not only would his sentence to prison be detrimental but that, unfortunately, only ten to 15 percent of the patients remain alive for three years. . . .
>
> If any—even with that knowledge, do not think for a second that I'm not absolutely ripped up over the thought that someone who would be the instigator and cause of this kind of conduct shouldn't, even with the lung cancer, go to prison. Don't think for a moment that it isn't still in my mind, and I am really torn up about what to do here.
>
> That said, if there were sufficient—and I don't like—pain, real pain, and part of that, I think, would be, in this case, financial pain, that's part of a—of a consideration . . . and identify assets to me that I can tie up, literally, so that I don't have to worry, and I mean like bank accounts. I mean real assets.
>
> I don't want garbage, and as long as I'm satisfied that I know where those are and I can tie them up, I'm willing to talk, but I want pain, financial pain out of this. At least, maybe that will balance this equation out a little bit.

sel's narrow focus on a few comments made by the trial judge fails to account for the totality of the trial judge's considerations at sentencing. There is no doubt that an order of restitution would cause this defendant financial pain, but financial pain does not automatically render the order primarily penal.

The order of restitution was issued under the authority of the Michigan Constitution and the Crime Victim's Rights Act. Art 1, § 24 and the Crime Victim's Rights Act were intended to enable victims to be compensated fairly for their suffering at the hands of convicted offenders. It is clear that the Court of Appeals did not recognize that the trial court intended that the order of restitution defray the financial loss suffered by the victims, Michigan Basic, and the Detroit Fire Department. Once the amount of restitution was decided, the trial judge emphasized that the proration of the restitution between the victims was a matter for them to decide and not a concern for the court or defendant.

Counsel for defendant cross appealed the voluntariness of the plea, arguing that it would be improper to allow a challenged order of restitution to stand. The Court of Appeals did not address the voluntariness of the plea, and we denied leave to appeal that issue. However, the logic that supports dismissing the appeal also supports enforcing the order of restitution.

We reverse the decision of the Court of Appeals and remand the case to the trial court for an order consistent with this opinion.

BRICKLEY, C.J., and BOYLE, RILEY, and MALLETT, JJ., concurred with WEAVER, J.

CAVANAGH, J. I respectfully dissent. I would

uphold the rule of abatement ab initio, and apply it to abate the entire criminal cause (i.e., the conviction and any collateral consequences of the conviction) in cases in which the defendant dies pending resolution of his appeal. In other words, I would uphold our prior decision in *People v Elauim,* 393 Mich 601; 227 NW2d 553 (1975). However, I would take this opportunity to confine *Elauim's* application to cases in which the defendant dies pending his *appeal of right.* In cases in which the defendant dies pending a *discretionary appeal,* I would hold that such an appeal should be dismissed as moot, and that the conviction and collateral consequences of the conviction should stand.[1]

When a defendant dies while his appeal of right is pending, I believe that the defendant's *appeal* and *conviction* should be abated for the reason endorsed by some federal courts, and by the instant Court of Appeals panel:

> The Supreme Court may dismiss the petition without prejudicing the rights of the deceased petitioner, for he has already had the benefit of the appellate review of his conviction to which he was entitled of right. In contrast, "when an appeal has been taken from a criminal conviction to the court of appeals and death has *deprived the accused of his right to* [*an appellate*] *decision, the interests of justice ordinarily require that he not stand convicted without resolution of the merits of*

[1] The majority of federal courts likewise distinguish between appeals of right and discretionary appeals, and apply the abatement ab initio rule to abate at least the appeal and conviction when the defendant dies pending an appeal of right. See *United States v Davis,* 953 F2d 1482 (CA 10, 1992); *Clarke v United States,* 286 US App DC 256; 915 F2d 699 (1990); *United States v Williams,* 874 F2d 968 (CA 5, 1989); *United States v Schumann,* 861 F2d 1234 (CA 11, 1988); *United States v Mollica,* 849 F2d 723 (CA 2, 1988); *United States v Wilcox,* 783 F2d 44 (CA 6, 1986); *United States v Littlefield,* 594 F2d 682 (CA 8, 1979); *United States v Bechtel,* 547 F2d 1379 (CA 9, 1977).

his appeal, which is an "integral part of [our] system for finally adjudicating [his] guilt or innocence." Griffin v Illinois, 351 US 12, 18; 76 S Ct 585, 590; 100 L Ed 891 (1956). [*United States v Moehlenkamp,* 557 F2d 126, 128 (CA 7, 1977). Emphasis added. See also *United States v Asset,* 990 F2d 208, 210-211 (CA 5, 1993); *United States v Oberlin,* 718 F2d 894 (CA 9, 1983); *United States v Pauline,* 625 F2d 684, 685 (CA 5, 1980); 205 Mich App 312, 317; 517 NW2d 773 (1994).]

When a defendant dies while his appeal of right is pending, I believe that any *further sanctions or orders arising from the defendant's conviction* should be abated for the following reasons stated by the instant Court of Appeals panel:

> In contrast to the holding in *Dudley,* we hold that a restitution order is dismissed when it is based on a criminal conviction that is abated ab initio. We arrive at this conclusion by considering the rationale behind the principle of abatement, which provides that a defendant should not stand convicted when death deprives the defendant of the right to an appellate decision. [*United States v Asset, supra* at 210-211.] This rationale is based on the premise that the resolution of an appeal can reverse a conviction. It is obvious that an appellate decision can also reverse those orders arising from a conviction such as a restitution order. Furthermore, the importance of an appellate decision is apparent in the Michigan Constitution, which declares that criminal defendants have a right to appeal. Const 1963, art 1, § 20. With this in mind, we believe that the principle of abatement extends to a restitution order where a defendant's death prevents an appeal of the defendant's conviction.
>
> * * *
>
> In order to abide by defendant's right to appeal, we dismiss the restitution order because appellate review is not possible. Although the victim has a right to restitution, this right does not entitle the

> victim to restitution imposed by an order that is not subject to appellate review.
>
> In addition, we disagree with the analysis in *Dudley* that a restitution order survives abatement ab initio of the underlying conviction on the ground that the primary purpose of restitution is to compensate the victim. Restitution under MCL 780.766(2); MSA 28.1287(766)(2) is part of the court's sentence, see [*People v*] *Schluter* [204 Mich App 60; 514 NW2d 489 (1994)], and is dependent upon the existence of a conviction. If the conviction is void, then the restitution order also becomes void because a victim's right to restitution remains dependent on a conviction. Thus, we are not convinced that a restitution order's compensatory purpose determines whether the order survives abatement ab initio of the underlying conviction. [205 Mich App 319-320.]

Obviously, I have a fundamental difference of opinion with the majority concerning the significance of a convicted defendant's constitutional right to an appeal. I cannot accept the majority's position that considerations of judicial economy are more important than assuring a proper appellate resolution of the guilt or innocence of a convicted defendant. ("[I]t is better policy to allow the litigation to end and the presumptively valid conviction to stand than it is to allow the convicted defendant's survivors to pursue litigation ad infinitum, in an effort to clear the deceased defendant's name." *Ante* at 521.) In my view, the interest of justice requires deference to a criminal defendant's constitutional right to an appeal when the defendant dies during the pendency of an appeal of right. While I am aware that a victim has a constitutional right to restitution and that a convicted defendant is no longer presumed innocent, I also believe that when the issues are compensation stemming from a conviction versus a final adjudication of a defendant's guilt or innocence, notions

of fundamental fairness demand giving priority to the latter guarantee.[2]

Because the defendant in this case died during the pendency of his appeal of right, I would abate the entire criminal cause—including the restitution order stemming from the conviction. The decision of the Court of Appeals should be affirmed.

LEVIN, J., concurred with CAVANAGH, J.

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[2] The majority misreads the Court of Appeals analysis of the compensatory component to the restitution order. The majority indicates that the reason that the Court of Appeals abated the restitution order in this case was because the Court considered the order to be "primarily penal." *Ante* at 526.

The Court of Appeals explicitly acknowledged both the compensatory and penal qualities of a restitution order. ("This Court has recognized that the purpose of restitution is to compensate the injured party. . . . In addition, a restitution order authorized under statute has punitive aspects." 205 Mich App 319.) However, the Court of Appeals did not find it necessary to determine which qualities predominated in the instant order because the Court's analysis of the abatement rule's application to the order did not turn upon the purpose of the order. Instead, the Court emphasized the relationship between the conviction and the restitution order. Recognizing that the conviction had to be abated under its understanding of the abatement doctrine, and further recognizing that the restitution order in this case was based on that conviction, the Court concluded that the restitution order likewise had to be abated. See, i.e., "If the conviction is void, then the restitution order also becomes void because a victim's right to restitution remains dependent on a conviction." 205 Mich App 320. Thus, contrary to the majority's suggestion, whether the restitution served a compensatory or penal purpose was not the dispositive factor under the Court of Appeals analysis.

Michigan Supreme Court
Lansing, Michigan

James H. Brickley
Chief Justice

Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallet, Jr.
Elizabeth A. Weaver
Justices

Order

Entered: January 4, 1995

99830 & (34)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,
Cross-Appellee,

v

LOUIS PETERS,

Defendant-Appellee,
Cross-Appellant.

SC: 99830
COA: 149161
LC: 90-5398

On order of the Court, the delayed application for leave to appeal is considered, and it is GRANTED. The application for leave to appeal as cross-appellant also is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 4, 1995

Corbin R. Davis
Clerk

PEOPLE v PETERS (AFTER REMAND)

Docket No. 149161. Submitted October 19, 1993, at Lansing. Decided May 16, 1994, at 9:40 A.M. Leave to appeal sought.

Louis Peters pleaded nolo contendere in the Recorder's Court for the City of Detroit, Michael J. Talbot, J., to one count of conspiracy to burn insured property, four counts of burning a dwelling house, two counts of burning other real property, and four counts of burning insured property. The court imposed a sentence of three years' probation and a fine, and ordered that restitution be paid. Before dying of cancer, the defendant appealed, challenging the plea and the restitution order. After the defendant's death, the Court of Appeals, BRENNAN, P.J., and GILLIS and GRIBBS, JJ., remanded the matter to the trial court for entry of an order abating the cause ab initio because the defendant had died while his appeal was pending (Docket No. 136343). The prosecution's motion for rehearing was denied, and the Supreme Court denied the prosecution's application for leave to appeal. 439 Mich 893 (1991). On remand, the trial court, Richard L. Cunningham, J., vacated the penal sanctions of the sentence but held that the order of restitution survived the abatement ab initio of the criminal cause. The defense appealed.

After remand, the Court of Appeals *held:*

1. The law of the case doctrine does not apply to the restitution question in this case. The doctrine applies only to questions specifically determined in an appellate court's prior decision regarding a particular issue and to questions necessarily determined to arrive at the prior decision.

2. The imposition of restitution constitutes a penalty. It is part of the court's sentence and is dependent upon the existence of a conviction.

3. A restitution order is dismissed when it is based on a criminal conviction that is abated ab initio.

Reversed.

REFERENCES

Am Jur 2d, Appeal and Error §§ 744, 746; Criminal Law § 623.

Abatement of state criminal case by accused's death pending appeal of conviction—modern cases. 80 ALR4th 189.

1. APPEAL — LAW OF THE CASE.

Under the law of the case doctrine, an appellate court's decision regarding a particular issue is binding on courts of equal or subordinate jurisdiction during subsequent proceedings in the same case; the doctrine applies only to those questions specifically determined in the prior decision and to questions necessarily determined to arrive at the prior decision.

2. CRIMINAL LAW — RESTITUTION — DEATH OF DEFENDANT — ABATEMENT AB INITIO OF CONVICTION AND RESTITUTION ORDERS.

An order of restitution based on a criminal conviction is dismissed where the conviction is abated ab initio because of the defendant's death during the pendency of an appeal from the conviction and order of restitution.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and *Janet A. Napp,* Assistant Prosecuting Attorney, for the people.

Elizabeth L. Jacobs, for the defendant on appeal.

AFTER REMAND

Before: MICHAEL J. KELLY, P.J., and SHEPHERD and MURPHY, JJ.

MURPHY, J. Defendant appealed as of right from the trial court's judgment concluding that the restitution part of defendant's sentence survives the abatement ab initio of the criminal cause against defendant. We reverse.

The parties do not dispute the basic facts of this case. On September 20, 1990, defendant pleaded no contest to one count of conspiracy to burn insured property, MCL 750.157a; MSA 28.354(1) and MCL 750.75; MSA 28.270, four counts of burning a dwelling house, MCL 750.72; MSA 28.267, two

counts of burning other real property, MCL 750.73; MSA 28.268, and four counts of burning insured property, MCL 750.75; MSA 28.270. At the time of the plea, defendant was suffering from terminal lung cancer. The trial court accepted the plea.

At the sentencing hearing, the parties disagreed about the possibility of incarceration and the amount of restitution to be paid to the victim, which was the Michigan Basic Property Insurance Association. The prosecutor asked for restitution in the amount of $179,106. This amount was based on the charges to which defendant pleaded no contest. The victim, however, calculated that over the last ten years it had paid $800,000 for claims that had involved defendant as the insured, including at least twenty-five claims that the victim had suspected were caused by arson. Defendant argued that he should not be required to pay for alleged offenses that occurred in the past.[1] After meeting

[1] In order to facilitate an agreement among the parties regarding the amount of restitution, the trial court stated in relevant part:

> I'm not telling you that I've already drawn a bottom line in terms of sentence, but we know as an absolute fact that Mr. Peters has cancer. He's 67 years old, and he has lung cancer, and, quite frankly, the doctor says that not only would his sentence to prison be detrimental but that, unfortunately, only ten to 15 percent of the patients remain alive for three years. . . .
>
> [E]ven with that knowledge, do not think for a second that I'm not absolutely ripped up over the thought that someone who would be the instigator and the cause of this kind of conduct shouldn't, even with the lung cancer, go to prison. Don't think for a moment that it isn't still in my mind, and I am really torn up about what to do here.
>
> That said, if there was sufficient . . . pain, real pain, and part of that, I think, would be, in this case, financial pain, that's part of a—of a consideration, and what I would ask you gentlemen to do . . . is the three of you go chat for a few minutes . . . and identify assets to me that I can tie up, literally, so that I don't have to worry, and I mean like bank accounts. I mean real assets.
>
> I don't want garbage, and as long as I'm satisfied that I know where those are and I can tie them up, I'm willing to talk, but I

off the record, the parties agreed on a recommendation that defendant should pay $400,000 in restitution.

Subsequently, the trial court imposed a sentence of three years' probation. In addition, the trial court stated that it was going to fashion a sentence that was "financially uncomfortable" by imposing a fine of $10,000 and a restitution order of $400,000 to be paid in $100,000 installments. Defendant failed to make the first $100,000 payment when it was due and, shortly thereafter, he died.

Before his death, defendant timely had filed an appeal that challenged the plea and the restitution order. After defendant's death, a motion was brought to remand to the trial court for entry of an order abating the cause ab initio because defendant had died while his appeal was pending. This Court granted the defense motion to remand for a dismissal of the cause, pursuant to *People v Elauim,* 393 Mich 601; 227 NW2d 553 (1975). Order of the Court of Appeals, July 16, 1991 (Docket No. 136343). The prosecutor moved for a rehearing and this Court denied the motion in an order dated September 6, 1991. The Michigan Supreme Court also denied the prosecutor's application for leave to appeal. 439 Mich 893 (1991).

On remand, the trial court vacated the penal sanctions, but held that the order of restitution survived the abatement ab initio of the criminal cause. According to the trial court, the order of restitution survives the abatement ab initio because a victim has a right to restitution under the Michigan Constitution. Further, the trial court adopted the rationale of *United States v Dudley,* 739 F2d 175 (CA 4, 1984), that allows an order of restitution to survive abatement of the proceedings

want pain, financial pain out of this. At least, maybe that will balance this equation out a little bit.

on the ground that restitution is designed to compensate the victim and is not a purely penal sanction such as a conviction or fine.

Before considering the correctness of the trial court's decision, we must first address defendant's argument that the law of the case doctrine prevented the trial court from determining that the restitution order survives abatement. Under the law of the case doctrine, an appellate court's decision regarding a particular issue is binding on courts of equal or subordinate jurisdiction during subsequent proceedings in the same case. *People v Herrera (On Remand)*, 204 Mich App 333; 514 NW2d 543 (1994). The doctrine applies only to those questions specifically determined in the prior decision and to questions necessarily determined to arrive at the prior decision. *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 546; 481 NW2d 762 (1992); also see *People v Douglas (On Remand)*, 191 Mich App 660, 662; 478 NW2d 737 (1991).

In this case, the prosecution raised the question regarding survival of the restitution order in its motion for a rehearing and application for leave to appeal. However, the question was not specifically determined by this Court or the Supreme Court, nor was determination of the question necessary to deny the prosecution's motions. Therefore, the law of the case doctrine does not apply to the restitution question.

The issue whether a restitution order survives an abatement ab initio of criminal proceedings is an issue of first impression in this state. In order to determine this issue, we have looked to other jurisdictions for guidance.

Michigan has followed the general rule that a prosecution of a criminal case abates ab initio when a defendant dies pending resolution of the

defendant's appeal. *People v Elauim, supra;* anno: *Abatement of state criminal case by accused's death pending appeal of conviction—modern cases,* 80 ALR4th 189, 191-193. The rationale behind this rule derives from the principle that

> "when an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to [an appellate] decision, the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal, which is an 'integral part of [our] system for finally adjudicating [his] guilt or innocence.' *Griffin v Illinois,* 351 US 12, 18; 76 S Ct 585, 590; 100 L Ed 891 (1956)." [*United States v Asset,* 990 F2d 208, 210-211 (CA 5, 1993), quoting *United States v Moehlenkamp,* 557 F2d 126, 128 (CA 7, 1977) (alteration in the original).

The Michigan Constitution provides that an accused in every criminal prosecution has a right to an appeal. Const 1963, art 1, § 20. In this case, defendant's death occurred during the pendency of his appeal as of right challenging the plea and the restitution order.[3]

An abatement ab initio of a criminal prosecution means a dismissal of all proceedings in the prosecution from its inception. E.g., *United States v Oberlin,* 718 F2d 894, 895 (CA 9, 1983). In such a case, there is an abatement of the appeal, the conviction, and the sentence. *Id.* Moreover, if the sentence included a fine, the abatement ab initio prevents recovery against the estate. *Id.*

However, certain courts have concluded that a restitution order does not abate by reason of a

[3] Defendant argued on appeal that his plea should be set aside because it was involuntary or, in the alternative, that he was entitled to a restitution order in the amount of $150,000 to $200,000, which was part of the promise that induced his plea.

defendant's death pending appeal.[3] In *United States v Dudley, supra,* the court held that an order of restitution requiring payment of $4,807.50 to the United States Department of Agriculture did not abate where the defendant died during the pendency of his appeal from a conviction of unlawful use of food stamp coupons. The court reasoned that a restitution order under 18 USC 3579 is unlike a fine or sentence because a restitution order has a predominantly compensatory purpose, even if it is penal in some respects.[4] *Dudley,* 177. On the basis of this distinction, the court concluded that the restitution order survives abatement ab initio of the conviction. *Id.,* 177-178.

In Michigan, a crime victim's right to restitution is declared in the state constitution. Const 1963, art 1, § 24. The Legislature provided for the enforcement of this section in the Crime Victim's Rights Act, MCL 780.751 *et seq.*; MSA 28.1287(751) *et seq.* Under the act, a sentencing court's authority to order restitution is set forth in MCL 780.766(2); MSA 28.1287(766)(2), which states:

> The court, when sentencing a defendant convicted of a crime, may order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make restitution to any victim of

[3] The Supreme Court of Utah has held that a restitution order does not abate by reason of the defendant's death pending appeal. *Utah v Christensen,* 866 P2d 533, 536-537 (Utah, 1993). However, the *Christensen* court reached this conclusion by first rejecting the principle of abatement ab initio and determining that a conviction does not abate. Instead, the court indicated that only an appeal abates. *Id.,* 535-536. On this ground, Michigan law differs from Utah law because the Michigan Supreme Court has adopted the principle of abatement ab initio. *Elauim, supra.*

[4] 18 USC 3579, redesignated as 18 USC 3663, provided that "[t]he court, when sentencing a defendant convicted of an offense under this title . . . may order, in addition to or in lieu of any other penalty . . . that the defendant make restitution to any victim . . . ." *Dudley, supra,* 177, n 3.

> the defendant's course of conduct which gives rise to the conviction, or to the victim's estate.

This Court has recognized that the purpose of restitution is to compensate the injured party. *People v Schluter*, 204 Mich App 60; 514 NW2d 489 (1994). In addition, a restitution order authorized under the statute has punitive aspects. See *Asset, supra*, 213. Indeed, the language of MCL 780.766(2); MSA 28.1287(766)(2), which states that a court may order restitution "in addition to or in lieu of any other penalty," indicates that the imposition of restitution constitutes a penalty. Moreover, the trial court's comments in this case suggested there was a punitive purpose behind the restitution order, which was designed to inflict "financial pain" on defendant.

In contrast to the holding in *Dudley*, we hold that a restitution order is dismissed when it is based on a criminal conviction that is abated ab initio.[5] We arrive at this conclusion by considering the rationale behind the principle of abatement, which provides that a defendant should not stand convicted when death deprives the defendant of the right to an appellate decision. *Asset, supra*, 210. This rationale is based on the premise that the resolution of an appeal can reverse a conviction. It is obvious that an appellate decision can also reverse those orders arising from a conviction such as a restitution order. Furthermore, the importance of an appellate decision is apparent in the Michigan Constitution, which declares that criminal defendants have a right to appeal. Const 1963, art 1, § 20. With this in mind, we believe

[5] We are not called upon to decide, nor do we, the issue whether a victim is required to return any partial or full restitution payments made by a defendant who dies before receiving an appellate resolution of the criminal cause underlying the restitution order. See *Asset, supra*.

that the principle of abatement extends to a restitution order where a defendant's death prevents an appeal of the defendant's conviction.

We also note that, unlike the defendant in *Dudley,* defendant in this case challenged the restitution order on appeal. Nonetheless, defendant's permanent absence prevents prosecution of his appeal of the restitution order. *Dudley, supra,* 176, n 1. In order to abide by defendant's right to appeal, we dismiss the restitution order because appellate review is not possible. Although the victim has a right to restitution, this right does not entitle the victim to restitution imposed by an order that is not subject to appellate review.

In addition, we disagree with the analysis in *Dudley* that a restitution order survives abatement ab initio of the underlying conviction on the ground that the primary purpose of restitution is to compensate the victim. Restitution under MCL 780.766(2); MSA 28.1287(766)(2) is part of the court's sentence, see *Schluter, supra,* and is dependent upon the existence of a conviction. If the conviction is void, then the restitution order also becomes void because a victim's right to restitution remains dependent on a conviction. Thus, we are not convinced that a restitution order's compensatory purpose determines whether the order survives abatement ab initio of the underlying conviction.

We recognize that our ruling may allow a defendant's estate to receive a benefit that may more appropriately belong to a victim. However, a victim may avoid this unfortunate consequence by bringing a separate civil action against the estate of the defendant, based on the defendant's wrongful conduct.

In light of our disposition that the restitution

order does not survive the abatement ab initio, we need not address defendant's other claims on appeal that challenge the restitution order on other grounds.

Reversed.

STATE OF MICHIGAN

IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

PEOPLE OF THE STATE OF MICHIGAN

Case No. 90-05398

vs

HON. RICHARD L. CUNNINGHAM
Recorder's Court Judge

LOUIS PETERS,

Defendant.

ORDER

At a session of the said court, held at the Frank Murphy Hall of Justice, Detroit, Michigan, on

FEB 4 1992

PRESENT: HON. RICHARD L. CUNNINGHAM
Recorder's Court Judge

This matter having come before the court upon an Order of the Michigan Court of Appeals instructing this court to dismiss this criminal cause *ab initio* because of the death of the defendant while an appeal of his conviction and sentence was pending;

The parties requesting this court's determination as to the effect of this *ab initio* dismissal upon that portion of the sentence requiring the payment of restitution;

Upon the reading and filing of the parties' motions and briefs, and this court being fully advised in the premises; and

This court finding that an order for restitution survives an *ab initio* dismissal of the criminal cause, and this court determining that Michigan Basic Property Insurance Association is a crime victim entitled to restitution.

IT IS HEREBY ORDERED that the above entitled criminal cause shall be, and hereby is DISMISSED.

IT IS FURTHER ORDERED that all the purely penal sanctions of the defendant's sentence shall be, and hereby are, VACATED.

IT IS FURTHER ORDERED that the provision of the sentence requiring the payment of restitution in the amount of $400,000 survives this *ab initio* dismissal of the criminal case.

IT IS FURTHER ORDERED that this order of restitution may be enforced by the Wayne County Prosecuting Attorney or by the Michigan Basic Property Insurance Association in the same manner as a judgment in a civil action.

RICHARD L. CUNNINGHAM

HON. RICHARD L. CUNNINGHAM
Recorder's Court Judge

ORDER
Entered: November 26, 1991

Michigan Supreme Court
Lansing, Michigan

Michael F. Cavanagh
Chief Justice

92369

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Cornstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SC: 92369
COA: 136343
LC: 90-005398

LOUIS PETERS,

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Brickley, Boyle, and Riley, JJ., would grant leave to appeal.

81121

SEAL

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

November 26, 1991

Corbin R. Davis
Clerk

Court of Appeals, State of Michigan

ORDER

People of Michigan v Louis Peters
Docket # 136343
L.C. # 90 005398

Thomas J. Brennan
Presiding Judge

John H. Gillis
Roman S. Gribbs
Judges

The Court orders that the motion to add Basic Property Insurance as a party to appeal is DENIED.

The Court further orders that this matter is remanded to the trial court for entry of an order dismissing this cause. *People* v *Elauim*, 393 Mich 601 (1975).

A true copy entered and certified by Daniel F. Walsh, Chief Clerk, on

STATE OF MICHIGAN COURT OF APPEALS SEAL

July 16, 1991
Date

Daniel F. Walsh
Chief Clerk

STATE OF MICHIGAN

IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff

vs

Recorder's Court No. 90-05398

LOUIS PETERS,

Defendant

ORDER OF RESTITUTION

at a session of said Court, held in the City of Detroit, Wayne County, Michigan, on

PRESENT: HON. MICHAEL TALBOT
Recorder's Court Judge

This Court, having reviewed the memorandum and communications submitted by the parties and having heard argument from the parties states:

IT IS HEREBY ORDERED AND ADJUDGED that defendant shall pay $400,000.00 in restitution in this matter, over the period of one year, commencing from the date of sentencing on November 16, 1990. Defendant shall pay the amount of $400,000.00 in installments of no less than $100,000.00 on or before each of the following dates: February 16, 1991, May 16, 1991, August 16, 1991 and November 16, 1991.

IT IS FURTHER ORDERED that defendant shall deliver to the Wayne County Prosecutor's Office on or before November 30, 1990 a list of all real property in which defendant has any kind of property interest and all real property in which any corporation in which defendant shall have any interest may have any property interest. Such a list shall include any real property located anywhere within the United States.

IT IS FURTHER ORDERED that the People, by and through the Wayne County Prosecutor's Office, shall be authorized to file or record any lis pendens or any other instrument to preserve their interest in this restitution order against any real property in which defendant shall have any interest of any kind, including defendant's residence at 348 Woodedge, Bloomfield Hills, Oakland County, Michigan, which residence shall be the last to be liquidated, if liquidation is necessary to satisfy this order of restitution.

IT IS FURTHER ORDERED that if defendant fails to pay any of the installment payments on the dates set forth above he shall be required to appear before this Court to establish good cause for his failure to comply with this Order.

_____

RECORDER'S COURT JUDGE

APPROVED AS TO FORM AND SUBSTANCE:

ROBERT J. SHEIKO

ROBERT J. SHEIKO
ASSISTANT PROSECUTING ATTORNEY

_____

CORNELIUS PITTS
ATTORNEY FOR DEFENDANT